

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1422

To be argued by
IRA H. BLOCK

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1422

UNITED STATES OF AMERICA,

Appellee,

—v.—

DENNIS W. MULLIGAN,

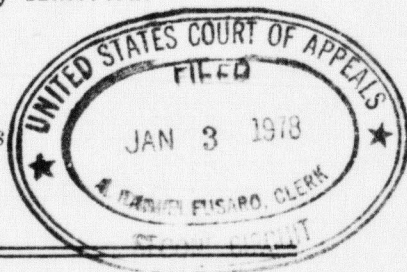
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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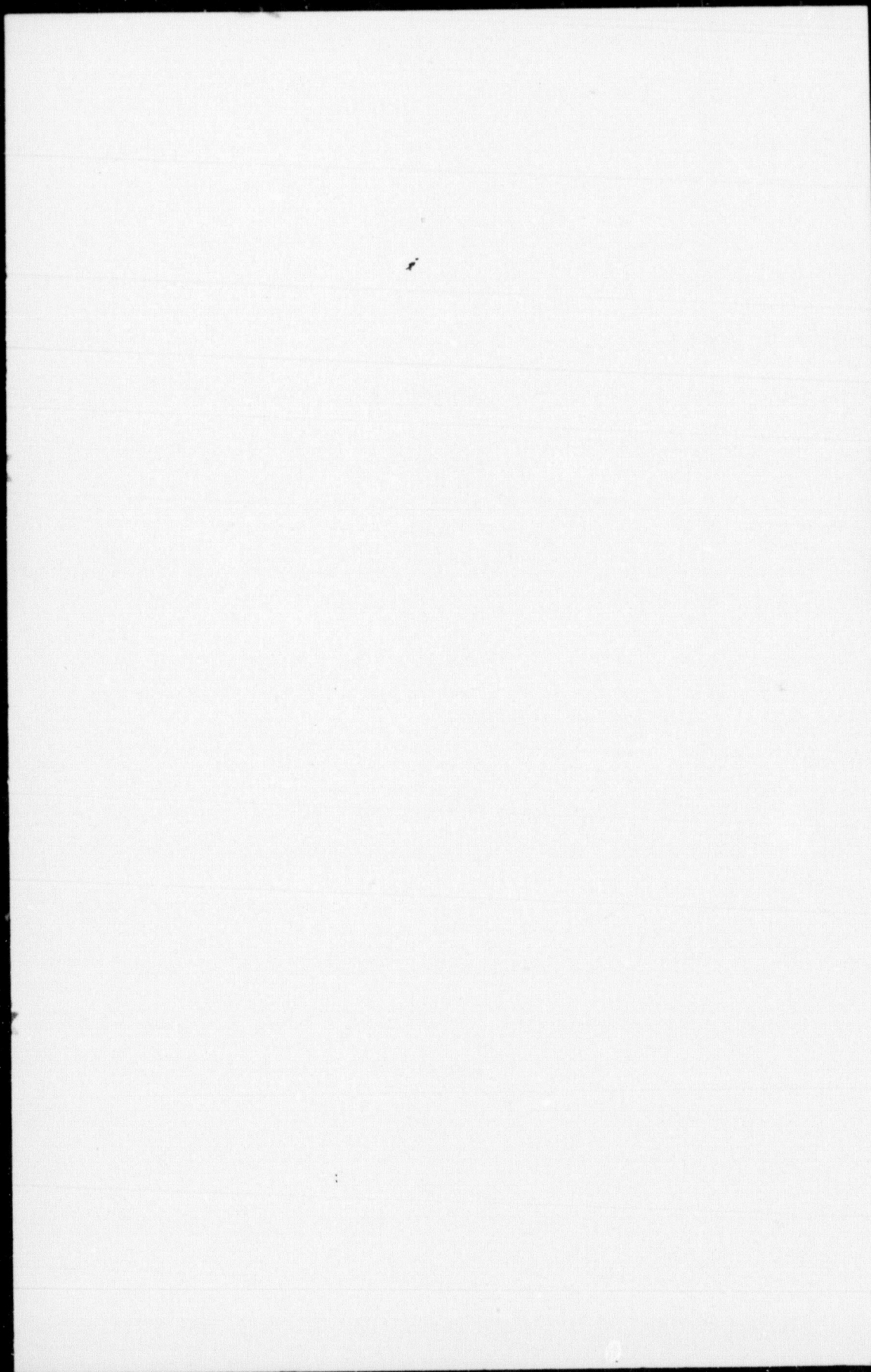


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1422

UNITED STATES OF AMERICA,

Appellee,

—v.—

DENNIS W. MULLIGAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Dennis W. Mulligan appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 6, 1977, after a ten-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 76 Cr. 988, filed on October 27, 1976, contained two counts. Count One charged Dennis W. Mulligan and John Anthony Cerasani, a/k/a "Baba" and "Bubbie", with conspiring to rob federally insured banks in violation of Title 18, United States Code, Section 371. Count Two charged the defendants with taking money, by force, violence and intimidation, from a federally insured bank, and with assaulting and placing in jeopardy the lives of persons by the use of firearms during the robbery, in violation of Title 18, United States Code, Sections 2113 (a), (d) and 2.

Superseding Indictment S76 Cr. 988 was filed on January 26, 1977. In addition to the charges contained in Indictment 76 Cr. 988, the superseding indictment contained five counts (Counts Three through Seven) charging defendant Mulligan only with having made false material declarations under oath before a United States grand jury in violation of Title 18, United States Code, Section 1623.

Trial on Counts One, Two, Three and Five of Indictment S76 Cr. 988 commenced on March 7, 1977 before Honorable Whitman Knapp.* That trial concluded on March 18, 1977 with the declaration of a mistrial owing to the failure of the jury to agree upon a verdict as to any of the counts with respect to either defendant.

On March 30, 1977 the case was reassigned from Judge Knapp to Judge Owen. Retrial commenced on June 7, 1977 and was concluded on June 20, 1977, when the jury found Mulligan guilty of the charge contained in Count Three and failed to agree upon a verdict on the other counts as to either defendant.

Following denial of Mulligan's motion to set aside the jury's verdict and for a new trial because of alleged *voir dire* misconduct by one juror, Mulligan was sentenced by Judge Owen on September 6, 1977 to the custody of the Attorney General for imprisonment for a period of two years.**

* An oral motion for entry of an order of *nolle prosequi* as to Indictment 76 Cr. 988 was made by the Government immediately prior to commencement of the trial. Counts Four, Six and Seven of Indictment S76 Cr. 988 had previously been dismissed upon motion of defendant Mulligan.

** An order of *nolle prosequi* with respect to Counts One, Two and Five of Indictment S76 Cr. 988 was entered on November 17, 1977.

Mulligan is presently free on bail pending appeal.

Statement of Facts

The Government's Case

On December 10, 1971 two armed masked men executed a robbery of \$45,000 cash from the New York Hospital branch of First National City Bank at 435 East 70th Street in Manhattan shortly after the money had been delivered by armored truck. The crime went unsolved until more than four years later when, after being apprehended on unrelated bank robbery charges in November, 1975, one of the perpetrators of the December 10, 1971 robbery, Frank Smith, began to cooperate with the Government. (Tr. 192-94, 449).^{*} Smith identified a New York City Police Detective named "Denny" as being the initial source of information about the vulnerability of the New York Hospital branch to robbery and the schedule of money deliveries there, as well as being the driver of the getaway car during the robbery. (Tr. 220, 231). He further identified other persons involved in planning and executing the robbery as Martin Shannon, John Harvey, Joseph Gernie and an associate of Gernie's named "Baba". (Tr. 464-65).

Thereafter, as a result of a joint investigation by the Federal Bureau of Investigation and internal affairs investigators from the Office of the Chief of Detectives of the New York City Police Department, "Denny" and "Baba" were identified as Dennis W. Mulligan, a Detective second grade with the Department assigned to the homicide squad, and John Anthony Cerasani, a known criminal associate of Joseph Gernie. (Tr. 1065-67, 1115-18). At the time Smith was apprehended, Gernie

^{*} "Tr." refers to the transcript of the trial; "GX" refers to the Government's exhibits at trial; "A." refers to appellant Mulligan's appendix; "Br." refers to appellant's brief.

and Harvey were both deceased, and Shannon was a fugitive on a 1974 mail fraud indictment which had been returned against him in the United States District Court for the Southern District of New York.* (Tr. 199, 206, 465). Shannon was apprehended in September, 1976 and shortly afterward he too began to co-operate with the Government. (Tr. 615).

Smith and Shannon were the chief witnesses against Mulligan and Cerasani at trial. They testified that the impetus to robbing this particular bank had come from Joe Gernie who had heard about the "pushover" basement bank from a tipster cop who was related to a girl that Gernie was "mixed up with" and once had been involved in a prior arrest of "three colored guys" who were going to rob that bank. (Tr. 219, 235, 617-21). Smith and Shannon went up to look at the bank, were persuaded that it could successfully be robbed and that other information which Gernie had furnished about the schedule of armored car deliveries to the bank was accurate. (Tr. 221, 622-27). They therefore told Gernie that they would go in on the robbery and sometime afterward Gernie set a date for robbing the bank. (Tr. 627-28).

On the date originally appointed to rob the bank, a Friday in November, 1971, Smith, Shannon and their friend, John Harvey, drove to the vicinity of the bank; Gernie and one or two other persons also were there. (Tr. 221-23, 628-30). However, the robbery was aborted after it was reported that there were too many police cars in the area. (Tr. 630).

On the morning of December 10, 1971, Smith, Shannon and Cerasani entered the New York Hospital complex and proceeded to the mid-point of an underground tunnel leading to the bank. (Tr. 224, 636-40). Upon

* Indictment 74 Cr. 473 (CSH).

receiving a signal from John Harvey that the armored truck had arrived as expected, the trio walked the rest of the way through the tunnel to the bank entrance; Shannon stood guard at the entrance as Smith and Cerasani relieved the head teller at gunpoint of the recently arrived bag containing \$45,000. (Tr. 225-26, 640-42). The trio escaped via a fire staircase leading to 71st Street, where Mulligan was waiting in a parked car which Cerasani, who was carrying the bank loot, and Shannon entered. (Tr. 228-32, 642-43). Smith left in a taxi. (Tr. 229).

With Mulligan behind the wheel, the getaway car drove west to Second Avenue and then south, turning onto the Queensboro Bridge. (Tr. 643-45). Once in Queens, Mulligan drove to his girlfriend's apartment building in Long Island City. (Tr. 231-32, 633-35, 645). Entering the building, Mulligan opened the door to a ground floor apartment and then invited Cerasani and Shannon in so that the robbery proceeds could be divided. (Tr. 645-49). When this task was completed, Mulligan and Cerasani drove Shannon to Queens Boulevard, where they let him out. (Tr. 649-50). Shannon met Smith at a bar in Queens later that day. (Tr. 230-32, 526-36, 650-53).

In addition to the foregoing, Smith testified to an unsuccessful attempted robbery of a branch of Chemical Bank at 81st Street and Broadway in which he had participated with Gernie, Cerasani and Mulligan sometime in the Fall of 1971 (Tr. 199-201, 204-11, 670-72), as well as a payroll robbery during that same period that he, Cerasani, and Mulligan had gone out on but abandoned after a police squad car happened on the scene. (Tr. 211-16).

Apart from the testimony of Smith and Shannon concerning the origin, planning and execution of the robbery conspiracy, the Government introduced proof that Mulli-

gan had been present in the bank at 435 East 70th Street on a stakeout about a year before the 1971 robbery which resulted in the arrest of four black males as they were preparing to rob the bank. (Tr. 510-16, 563, 1073-74; GX 8, 51, 71). The evidence further showed that on the day of the robbery—December 10, 1971—Mulligan had been off-duty on vacation (Tr. 1068-73, 1083; GX 25-26) but nevertheless was present in Manhattan that day to cash his paycheck. (Tr. 906-07, 962; GX 39). There also was proof that Mulligan had a cousin named Maureen Cullen who had been Joe Gernie's girlfriend during 1971 (Tr. 948-49, 957, 1280), and that he had a girlfriend of his own named Bernadette Michel who lived in a ground floor apartment in Long Island City, Queens during 1971 where he visited her and often stayed overnight, and to which he had his own key. (Tr. 970-71, 980-81). Testimony adduced at trial also demonstrated that Shannon had identified Ms. Michel's apartment building for the investigators (Tr. 664-67, 904-05), and that Smith and Shannon had each identified Mulligan and Cerasani at lineups conducted at FBI headquarters. (Tr. 237-38, 662-64, 1037-61).

Additionally, proof was introduced that on April 5, 1976—four months before Cerasani had even been identified by the joint FBI-Police Department investigating team as possibly being the "Baba" who was Gernie's associate about whom Smith had spoken in November, 1975—a two minute telephone call was placed from the telephone number subscribed to by Cerasani on Monroe Street in lower Manhattan to the number for the telephone installed in Mulligan's home in Emerson, New Jersey.* (Tr. 489-95, 507-08, 1087, 1108, 1115; GX 41, 42, 45, 45A-45D). Further evidence established that

* Although the subscriber listing for this number was in the name of "J. Mulligan", the billing listing was in the name of "D.W. Mulligan". (Tr. 507-08).

Mulligan was off-duty on that day (Tr. 1068-73, 1084-35; GX 52), that he usually spent his days off at home with his family in New Jersey (Tr. 976, 1145), and that one week earlier, on March 29, 1976, Mulligan had received a telephone request from a Special Agent of the FBI for assistance in locating his cousin who had been Joe Gernie's girlfriend so that the FBI could talk to her about some of Gernie's criminal associates including, specifically, Martin Shannon, whom the FBI was trying to locate. (Tr. 480-82).

Portions of testimony given by Mulligan on September 13, 1976—more than five months after the two minute call from Cerasani's apartment to Mulligan's home—before the grand jury investigating the December 10, 1971 robbery were introduced into evidence and read to the jury. (Tr. 963-68; GX 40). These showed that after first being advised of his constitutional rights—and being expressly notified that he was a target of the grand jury's investigation—Mulligan denied under oath recognizing a photograph of John Cerasani, or recognizing that name or the nickname "Baba". Mulligan similarly denied knowing or recognizing photographs of Frank Smith and Martin Shannon. (Tr. 966-68; GX 1, 4-5).

The Defense Case

Mulligan called a number of character witnesses who testified as to his good reputation or their own high opinions of him within his residence and social communities (Tr. 1143-44, 1153-54, 1256-58, 1262-63), and the police fraternity. (Tr. 1148-49, 1161-62, 1307, 1329). None of these witnesses had any personal knowledge of the events of December 10, 1971. (Tr. 1261, 1264-65,

* These sworn denials formed the basis of the charge contained in Count Three of Indictment S76 Cr. 988 upon which Mulligan was convicted.

1325). All but one of those character witnesses who knew Mulligan through their shared law enforcement responsibilities testified that they had heard or that they knew of allegations that Mulligan had engaged in corrupt and illegal activities while he was assigned as a Detective to the 20th Precinct Squad, but that these did not adversely affect their opinions as to his reputation or character. (Tr. 1165-67, 1173-78, 1309-11, 1322).

Apart from a former colleague of Mulligan's on the 20th Detective Squad who gave testimony with respect to the number of squad cars available in that precinct in December, 1971 (Tr. 1283-87), the only substantive witness called by Mulligan was his cousin, John Cullen, the younger brother of Maureen Cullen. (Tr. 1268-69, 1275). He recited the strained relations within his family when it became known that Maureen was going out with Joe Gernie. He also narrated the facts and circumstances of an altercation between Gernie and Mulligan over Maureen which had occurred in 1967. (Tr. 1268-74).

The only explanation offered by the defense for the existence of a record of the April 5, 1976 long-distance telephone call from the Cerasani apartment to Mulligan's New Jersey home was that the telephone call and/or the record thereof had been manufactured or fabricated by the Government. (Tr. 497-503, 1343-49, 1447-48, 1560-65).

Neither Mulligan nor Cerasani testified in his own behalf, and Cerasani presented no witnesses at all. (Tr. 1336, 1370-71).

Post-Verdict Proceedings

Shortly after the verdict was returned, Judge Owen received a letter (A. 77) from one of the jurors (Mr. Yusef Bulos) stating, in substance, that he regretted

having voted to convict Mulligan of committing perjury before the grand jury. This letter was forwarded by Judge Owen to counsel. Thereafter, upon the Government's motion, the District Court entered a protective order prohibiting the parties from communicating with any member of the jury. (Transcript of proceedings on June 28, 1977, p. 7).

Subsequently, a letter (A. 78-81) was received from another juror (Ms. Virginia Stephenson) by the Assistant United States Attorney who had represented the Government at trial. Copies of the letter were immediately furnished to defense counsel and the Court. (A. 123). This letter later formed the basis, in part, for a motion filed by Mulligan on the eve of his scheduled sentence seeking to set aside the jury verdict and for a new trial. (A. 228; Transcript of proceedings of July 13, 1977, pp. 1-7). After receiving extensive briefs on the issues and considerable oral argument, and holding two evidentiary hearings to resolve disputed factual matters, the motion was denied in a bench decision rendered by the District Court on August 18, 1977 and adhered to upon reargument on September 6, 1977.*

* The factual background of these post-trial proceedings is more extensively discussed *infra*, pp. 10-17.

A R G U M E N T

P O I N T I

Mulligan Is Not Entitled To A New Trial On The Ground That A Juror Failed To Disclose Her Prior Arrest During The Voir Dire Examination.

Nearly one month after the jury returned its verdict of guilty Mulligan sought to overturn that verdict because one of the jurors, Ms. Virginia Stephenson, had not volunteered on the *voir dire* that she had been arrested three-and-one-half years earlier on a charge which was immediately dismissed. (A. 226). Judge Owen thereupon adjourned Mulligan's sentencing to allow full consideration of defendant's new trial motion. (Transcript of proceedings on July 15, 1977, p. 5). The court subsequently received extensive written (A. 236-41, 286-332) and oral (A. 100-40) submissions from both sides, as well as a detailed factual recital concerning the background and chronology of Ms. Stephenson's arrest and subsequent court proceedings, all the product of a post-trial investigation conducted by the Government. (A. 242-85). Judge Owen then summoned the juror and questioned her under oath in the presence of counsel for the parties as to her explanation for non-disclosure of her prior arrest (A. 140-53), and thereafter heard sworn testimony from the juror's former attorney, upon whose advice she relied. At the conclusion of all of these proceedings, the trial judge rendered two oral opinions in which he found that the juror, in good faith, had not disclosed the prior arrest based upon the advice of her counsel that the arrest was a nullity given the immediate dismissal of the charges against her and the expungement of all records pertaining to the arrest. (A. 154-55; 197-201). In addition to the District Court's conclusion that the juror had not committed perjury on the *voir dire*, Judge Owen found that,

in any event, Mulligan utterly had failed to demonstrate prejudice resulting from Ms. Stephenson's service on the jury which convicted him. (A. 154).

Having twice been accorded evidentiary hearings to test his unwarranted assertions of juror misconduct and having been unable to persuade the District Judge to grant him a new trial, before this Court Mulligan has launched an unwarranted multi-faceted attack upon the competency and impartiality of the juror in question, as well as upon the procedures followed by Judge Owen in evaluating the issue. Contrary to these assertions, Judge Owen carefully and thoroughly explored the issue, and, based upon sound and proper findings, correctly exercised his discretion in refusing to set aside the jury's verdict.

A. The Post-Trial Hearings Before Judge Owen And The District Court's Decisions.

As part of its response to Mulligan's new trial motion in the District Court, the Government submitted a series of documentary materials from the files and records of, *inter alia*, the New York City Police Department and New York City Criminal Court. (A. 242-85). These materials disclosed that Ms. Stephenson was arrested in November, 1973 by a member of the New York City Police Department acting on the complaint of one Joseph Scelza, a watchman at the United States Post Office at 909 Third Avenue in Manhattan, who alleged that Ms. Stephenson had assaulted him by striking him in the back of the head with an unknown object. (A. 243). After spending the night in jail, she was arraigned in the New York City Criminal Court the next morning on a felony assault charge. At arraignment, the case against Ms. Stephenson was marked "final against the People" and she was released on her own recognizance pending the

adjourned date. (A. 244). On the adjourned date the charges were immediately reduced to a misdemeanor and, when the complainant Postal Service watchman failed to appear as required, the charges against Ms. Stephenson were dismissed by the District Attorney with the approval of the presiding judge. (A. 245). Shortly after this dismissal, Ms. Stephenson, apparently at the suggestion and with the assistance of her attorney, Robert Dobrish, Esq., invoked the provisions of Section 79-e of the New York Civil Rights Law* and sought return of all photographs and fingerprints taken upon her arrest. (A. 145-46, 182-83, 245-46). These items were subsequently assembled and made available for return to Ms. Stephenson. (A. 182, 246-47).

At the post-trial hearing before Judge Owen, Ms. Stephenson was asked to account for her *voir dire* answer "No, sir" in response to the Judge's inquiry whether "you or your family were ever involved in a criminal case," in the light of the later developed information that she had once been "charged with striking a post office employee in the back of the head." The juror replied:

"That case was dismissed, those charges were dropped. It was my understanding from my attorney at the time that this is the same as [if] it never happened, that he told me that if I were ever asked if I had been involved in a criminal case, I could honestly say no and I said, 'Well, what about if they ask me if I was ever arrested,' and he said, 'You say so, because technically, you were not.'" (A. 144).

Later, in the course of further inquiry by the District Court addressed to the possible effect of her prior arrest

* The text of that provision, later repealed, is set forth in the Addendum to this Brief.

upon her ability to have rendered impartial service as a juror, the following colloquy ensued:

"Q. Now, let me ask you this:

In answering as you did, did you at that time have any views of the merits of this case or any particular personal feelings about any party? Did you harbor any feelings against any party to this case?

A. Oh, no, sir.

Q. Was there any reservation in your mind about wanting to get on to this jury so that you could get back at the Police Department or any member of it?

A. Oh, no, sir. I had no grudge with the Police Department. I was treated very well, quite frankly. It was an experience that I otherwise—I thought, I don't want to go to jail again but it was an experience. Otherwise, I would have not had——

Q. Did that experience in any way leave any mark on you that affected the impartiality that you brought to the case starting in the beginning?

A. Oh, no, sir. That—that's been so many years ago and I have no grudge against the Police Department whatsoever." (A. 146-47).

Following his examination of juror Stephenson, Judge Owen rendered a brief oral opinion from the bench denying Mulligan's new trial motion:

"Gentlemen, I am going to deny the motion for a new trial. I am going to deny it on the ground that the sole attack here that I was required to consider was that there had been a deliberate withholding of relevant information on the voir dire

which deliberately worked to the prejudice of the defendant.

While it is the least of the considerations, I find that there is no showing before me that the defendant was prejudiced by these answers, even had one assumed that they were deliberately erroneously or falsely given.

Secondly, I am completely satisfied by the answers that I have received from Juror Stephenson under oath that these answers were not false; they were given by her in a good faith belief which, according to the Government's papers, seems to be founded upon New York statute but, in any event, a good faith belief under the advice of her counsel, that, the case having been dismissed a second time around, that she was entitled to treat it or any alleged arrest that occurred in connection with it as being a nullity as if it had never existed. Her answer was given on that basis and was not an effort to mislead the Court.

I further find that on the basis of the answers that I received, there was no animus borne by her consciously or otherwise against any party to this case which she was concealing in order to get on the jury to thereafter exhibit by a verdict.

Given the foregoing, this is controlled by such cases as *United States against [Eury]*, 268 F.2d 517, Second Circuit 1959. On the basis of the foregoing, I am denying the motion for a new trial. The foregoing constitute my findings of fact and conclusions of law." (A. 154-55).

Shortly before the adjourned sentence date, Mulligan's counsel moved to reopen the hearing on the new trial motion. (A. 333). At that time counsel presented vague hearsay statements attributed to Robert Dobrish, Esq.,

the attorney who represented Ms. Stephenson in 1973 (and whom she had identified by name in response to Judge Owen's inquiry). Mulligan's motion papers asserted that Dobrish had said that he had never given Ms. Stephenson "such advice," referring to her explanation that her attorney advised her that she need not disclose her 1973 arrest. (A. 334). The District Court summoned Mr. Dobrish to the courthouse and questioned him under oath as to conversations with Ms. Stephenson concerning the dismissal of the charges against her. (A. 178, 179-92). Despite the bald assertion in Mulligan's motion papers that Ms. Stephenson's counsel had stated that he had never given Ms. Stephenson "such advice," under questioning by Judge Owen, Dobrish made it plain that he had no specific recollection one way or the other of any conversation with Ms. Stephenson on this subject:

"Q. I think the record shows that the case was dismissed for failure to prosecute or something like that the second time it was on. She was held overnight one night. She was released. The case was set for a week later or so and you and she came back a week later, is that right?

A. It sounds right. I remember being in court one time with her and I remember the case being dismissed.

Q. Following that it is her testimony that she asked you in words or in substance about how that left her as far as being and having to tell the world that she had been arrested was concerned. She was concerned because the case had been dismissed and if somebody asked her if she had been arrested what was her response to be.

She said, 'He said, "You say no because technically you were not.'"

Do you remember having any conversation with her about this general subject matter?

A. I have no specific recollection of any conversation that I had with her about this subject.

Q. What you're telling me is you could have [had] one but you don't remember it?

A. Yes.

Q. Or you could not have had one and you don't remember?

A. Such a conversation could definitely have taken place.

Q. I see.

A. I do not recollect the specific conversation with her at that time. I don't know if she is referring to a conversation that took place after court or at some future time on the telephone or what. I do not have a specific recollection of that conversation where or when it took place but it certainly could have taken place." (A. 180-82).

With the record thus amplified, Judge Owen in a brief oral ruling adhered to his original finding that Stephenson's *voir dire* response was given in good faith reliance on counsel's advice:

"I have before me a motion to reopen the hearing on defendant's motion to set aside the jury verdict. The essence of it is the claim that Juror Stephenson to the defendant's prejudice perjured herself when responding to a question as to whether she had ever been involved in a criminal case by denying the fact of an arrest.

The undisputed fact is that her information about denying or her information about her legal right to deny this obviously had to come to her from somewhere. It did not come out of the thin air. She was asked about this. She immediately

said, Yes, I knew about that but I believed I did not have to say anything about it.

There was no hiding the fact of her knowledge of the arrest. So it is a question then of her good faith in denying it.

As I say she had to get the information on which she based her right to deny it from somewhere. Also it is crystal clear that the case was speedily dismissed for failure to prosecute. It would appear reasonable men seem to be disagreeing but it would appear more likely so than that certainly on the state of the law today she is right to the extent that she had a right to deny it. Her attorney wrote and got her fingerprints back for her which is obviously based on a belief on both their parts that she should be put in the position as to where she had been before the fingerprints had been taken." (A. 197-98).

B. The District Court's Finding That Juror Stephenson Acted In Good Faith In Omitting Mention Of Her 1973 Arrest Is Plainly Correct.

In response to the question asked on *voir dire* whether "[y]ou or your family ever been involved in a criminal case",* Ms. Stephenson answered "No, sir." (A. 92). The defense claims that this response by Ms. Stephenson was both wilfully perjurious and so compellingly demonstrative of her supposed clear and convincing bias against Mulligan as to have denied him his Sixth Amendment

* Earlier in the *voir dire* Judge Owen had advised the entire panel of prospective jurors that the short-hand phrase "ever been involved" referred to the status of victim, complainant, witness or defendant. See, e.g., Transcript of the *voir dire* examination conducted on June 7, 1977 ("Voir Dire Tr."), pp. 10, 17.

right to trial before an impartial jury. Judge Owen squarely rejected these contentions after taking testimony first from the juror and later, upon Mulligan's specific request to reopen the hearing, from the juror's counsel. Considering the trial court's ability to observe Stephenson firsthand both during the trial and in the post-verdict hearing, as well as the absence of any contradiction of her sworn explanation for not revealing her 1973 arrest (A. 198-200), the trial court's finding of good faith is entitled to great weight and should not be set aside unless manifestly in error. See, e.g., *United States v. Johnson*, 327 U.S. 106, 111-12 (1946); *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 356-57 (1963); *United States v. Pfingst*, 490 F.2d 262, 264, 273 n.11 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States v. Troche*, 213 F.2d 401, 403 (2d Cir. 1954).

On this appeal, Mulligan has not pointed to any sound basis for concluding that Judge Owen's findings of fact were manifestly in error. Ms. Stephenson's account for her failure to volunteer the information about her expunged arrest clearly was fully supported by the contemporaneous documents which showed dismissal of the charges against her and the successful efforts of her attorney to have fingerprint and photographic records returned and all references to the arrest removed from official records, pursuant to the procedures prescribed by New York Civil Rights Law § 79-e.* While Mulligan

* While the question properly before Judge Owen was the juror's "good faith" non-disclosure of her arrest in reliance upon the advice of her attorney, it is of some moment that the policy underlying the applicable New York law providing for expungement of records fully supported Ms. Stephenson's belief that she was answering the *voir dire* questions truthfully. Both the statute in effect at the time of Ms. Stephenson's arrest and its successor provisions, New York Criminal Procedure Law §§ 160.50 and

[Footnote continued on following page]

seeks to distort the record with the claim (Br. 16) that Dobrish, Stephenson's attorney, contradicted her testimony about his legal advice, in fact Dobrish testified that he could not recall one way or the other whether such a conversation occurred, "but it certainly could have taken place." (A. 182).

In short, Judge Owen's conclusion that Ms. Stephenson did not commit perjury on the *voir dire* was fully supported by the record and was manifestly correct.* In light of the self-initiated expunction of official records of her arrest, and New York's public policy de-

160.60, quoted in the Addendum, recognize that one isolated incident will not forever haunt a person previously accused for whom the presumption of innocence was never overcome by a finding of guilt. See 1976 McKinney's Session Law News, No. 8, pp. A-395-96; *United States v. Schnitzer*, Dkt. No. 77-1267, slip op. 593, 597 n.4 (2d Cir., Nov. 30, 1977); cf. 18 U.S.C. §§ 5021, 5038; 21 U.S.C. § 844(b). See generally *Mestre Morera v. Immigration & Naturalization Service*, 462 F.2d 1030, 1032 (1st Cir. 1972). The very purpose of these legislative provisions of New York law is to return to the *status quo ante* someone such as Ms. Stephenson who, although arrested, never thereafter was prosecuted, let alone convicted of a crime.

* Mulligan argues that the hearing before Judge Owen was not complete because the District Court refused to allow defendant's counsel to conduct the juror's interrogation and declined to inquire into broad areas proposed by Mulligan. These claims ignore the settled principle that a post-trial interrogation such as that involved here should be conducted by the court and not by counsel. *United States v. Brasco*, 516 F.2d 816, 819 n.4 (2d Cir.), cert. denied, 423 U.S. 860 (1975). Moreover, the broad additional areas of inquiry proposed by Mulligan had no direct bearing on the juror's testimony since she already had explained her reason for not volunteering information about the arrest. The trial court's clear discretion to limit such an irrelevant and intrusive fishing expedition plainly was not abused here, particularly where defendant's original motion had been premised upon a misleading and highly incomplete account of the relevant background.

declaring a subsequently dismissed arrest "a nullity," restoring the arrestee to the *status quo ante* and providing that the arrestee shall not "be required to divulge information pertaining to the arrest or prosecution," * it is manifest that the non-disclosure of the so-called Scelza-arrest incident was inadvertent and without purpose of obstructing the jury selection process. As a matter of law, therefore, a new trial was not required unless Mulligan persuasively demonstrated that his right to a fair trial had been so compromised by the non-disclosure that justice had not been done. This he wholly failed to do.

C. The District Court Properly Concluded That Mulligan Had Not Been Prejudiced By Ms. Stephenson's Service On The Jury.

Stripped of its accompanying flourishes of rhetoric and multiple personal castigations of Ms. Stephenson, Mulligan's position on this appeal seems to be that the verdict should be set aside and a new trial had simply because he and his counsel were unaware of the Scelza-arrest incident while the jury was being selected. Such is not the law. Where, as here, a new trial has been sought in the trial court on the ground that a prospective juror failed to disclose material information during examination as to his qualifications, the burden is on the defense to establish satisfactorily that "the juror deliberately attempted to deceive the Court by intentionally concealing facts reasonably called for by a question and that the defendant was prejudiced thereby." *United States v. Baker*, 266 F. Supp. 461, 462-63 (D.D.C. 1967), *remanded on other grounds*, 401 F.2d 958 (D.C. Cir. 1968) (emphasis added). See also *Turner v. United States*, 416 F.2d 815, 817 (D.C. Cir. 1969); *Marshall v.*

* See pp. 18n-19n, *supra*; CPL § 160.60, *infra*, p. 5a.

United States, 355 F.2d 99, 1009 (9th Cir.), *cert. denied*, 385 U.S. 815 (1966). In this case, the post-trial hearing conducted in the District Court revealed that the juror's failure to disclose information about her 1973 arrest was in good faith reliance on the favorable termination of the charges against her and the advice which her lawyer had furnished. As we have already pointed out, these circumstances alone warranted Judge Owen's denial of Mulligan's new trial motion. In any event, however, the motion was properly denied because, as well-established legal precedent and experience make manifest, Mulligan totally failed to sustain the required showing of prejudice to his right to a fair and impartial trial from Ms. Stephenson's presence on the jury.

The affirmative of the issue of juror impartiality is upon the challenger, *Mikus v. United States*, 433 F.2d 718, 723 (2d Cir. 1970); *United States v. Ragland*, 375 F.2d 471, 475 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), and in any trial the law presumes that the jury is impartial and unbiased. *United States v. Wayman*, 510 F.2d 1020, 1024 (5th Cir.), *cert. denied*, 423 U.S. 846 (1975); *United States v. Brasco*, 385 F. Supp. 966, 968-69 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). Unless and until this presumptive validity of the jury verdict is overcome by competent credible evidence establishing essential unfairness and prejudice of constitutional dimension, the movant has not shouldered his burden and a new trial is not required. *United States v. Provenzano*, 240 F. Supp. 393, 408 (D.N.J.), *aff'd per curiam*, 353 F.2d 1011 (3d Cir. 1965), *cert. denied*, 384 U.S. 905 (1966). *Cf. United States v. Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *United States v. Ellenbogen*, 365 F.2d 982, 989 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

In his brief Mulligan invokes a congeries of arguments, all of which reduce to the syllogistic proposition that, because after hearing the evidence adduced at trial, juror Stephenson evidently was convinced of Mulligan's guilt, the facts and circumstances of her 1973 arrest and her *voir dire* non-response concerning this matter *per se* established bias, prejudice and incompetence to have served as a juror. According to defendant, had Ms. Stephenson on the *voir dire* volunteered information about her prior experience, she would in all probability have been excused by the District Judge as biased, and failing that, by the defense peremptorily. To buttress this otherwise unimpressive retrospective speculation, Mulligan improperly makes reference to the post-verdict letters sent by Ms. Stephenson to Government counsel and by another juror, Mr. Bulos, to the trial judge, as somehow indicative of a pre-existing bias on the part of Ms. Stephenson. Such carefully postulated after-the-fact musings about defense counsel's juror selection strategy do not suffice to establish a fundamental unfairness and deprivation of constitutional right necessary to award Mulligan a new trial.

Although Mulligan deliberately avoids addressing this issue in his brief, it is plain under Rule 606(b) of the Federal Rules of Evidence * that both the Bulos and

* Rule 606(b) provides:

"(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

Stephenson letters were totally incompetent to impeach the jury's verdict and are of no evidentiary value whatever on this appeal. See *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). This Court has time and again approved the policy codified in Fed. R. Evid. 606(b) and refused to consider statements by jurors concerning either the mental processes and reasoning through which their verdict was reached or the subjective effects upon their vote of impermissible outside influences introduced into the jury room. *E.g.*, *Rotondo v. Isthmian Steamship Co.*, 243 F.2d 581, 583 (2d Cir.), *cert. denied*, 355 U.S. 834 (1957); *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962); *Miller v. United States*, 403 F.2d 77, 83-84 n.11 (2d Cir. 1968); *United States v. Dioguardi*, 492 F.2d 70, 79-80 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974); *United States v. Green*, *supra*, 523 F.2d at 235; *United States v. Moten*, Dkt. No. 77-1085, slip op. 5769, 5782 n.9 (2d Cir., Sept. 6, 1977).^{*} Judge Owen thus properly rejected the Bulos and Stephenson letters as establishing prejudice to Mulligan from the composition of the jury. (A. 111). See Transcript of proceedings on June 28, 1977, pp. 5-6.

^{*} Although the rule against using a juror's communication to impeach the verdict is not without exceptions, none of these is applicable here. See, *e.g.*, *Mattox v. United States*, 146 U.S. 140 (1892) (juror testimony competent to establish fact, but not effect, of outside influence in the form of newspaper editorials); *Remmer v. United States*, 350 U.S. 377 (1956) (same, outside influence in the nature of impermissible contact with unknown third party who had offered jury foreman a bribe to acquit defendant); *Parker v. Gladden*, 385 U.S. 363 (1966) (same, unauthorized communication from bailiff to jurors concerning the defendant on trial); *United States v. Rattenni*, 480 F.2d 195, 198 (2d Cir. 1973) (same, prejudicial news accounts and radio broadcasts about defendant read and heard by jurors); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 819-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (same, consideration by the jury of evidence not received during trial).

In any event, even if the jurors' letters were competent evidence—and they are not—all that they revealed about the jury's deliberations was that the verdict perhaps was the product of a compromise forged during the dynamics of the deliberations among the jurors themselves, a result to be encouraged and, under established decisions of this Circuit, certainly not the basis for awarding Mulligan a new trial. *United States v. Green*, *supra*, 528 F.2d at 235-36; *Grace Lines, Inc. v. Motley*, 439 F.2d 1028, 1031-32 (2d Cir. 1971); *United States v. Grieco*, 261 F.2d 414, 415 (2d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). *See also Hyde v. United States*, 225 U.S. 347 (1912).^{*} Neither of these letters, even given the tortured interpretation applied by Mulligan,^{**} suggests that some

^{*} To the extent Mulligan claims (Br. 13, 33) that the Bulos letter demonstrates an absence of unanimity in the verdict, it is significant to note that the jurors were *twice* polled concerning their agreement to the verdict finding Mulligan guilty on Count Three. (Tr. 1706-07; A. 137). This established "for a certainty that each of the jurors approve[d] of the verdict as returned." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899).

^{**} The essential tack of Mulligan's appellate brief is to attempt to create a misguided and distorted picture of juror Stephenson by exaggerating the claimed import of the substance of her post-verdict letter to the prosecutor. The very type of attack launched by Mulligan in this Court makes manifest the wisdom of Rule 606(b)'s prohibition against the use of such post-verdict communications from a juror to impeach the jury's verdict. Moreover, while the letter in its form and content was unusual, it hardly supports the allegations of pre-existing bias or incompetence which permeate Mulligan's presentation in this Court. To the extent that the extremely well-written letter demonstrates the juror's firm post-verdict belief in Mulligan's guilt, it does not suggest in any way that such conviction was developed other than upon her conscientious view of the evidence reached at the conclusion of the trial, nor does it raise the slightest spectre of an outside influence upon the juror which defendant now claims adhered from the incident of Ms. Stephenson's earlier arrest. Regardless of defendant's vigorous efforts to apply suggestive labels and characterizations of the juror from the substance of this letter, Mulligan's wrenched interpretation of the letter simply does not advance either the claim of pre-existing bias or of incompetence.

pre-existing bias against defendant entered into the jury's deliberations in the slightest. Rather, the letters showed no more than that the jury reached its collective decision through a conscientious and vigorous exchange of views of the evidence in an effort to achieve a unanimous verdict, an exercise consistent with the jurors' sworn obligation to listen to and weigh the views of each other in carrying out their ministry to do justice. *See Grace Lines, Inc. v. Motley, supra*, 439 F.2d at 1033.

The linchpin of Mulligan's arguments concerning prejudice is that he was not afforded information allegedly "regarding potential bias and other disqualifications of juror Stephenson which was requisite to exercising his right to challenge her during jury selection." (Br. 20). Thus, Mulligan would have this Court conclude that "the defense was particularly concerned during jury selection with the prior exposure potential jurors might have had to police or criminal proceedings . . . [which] carried with it the possibility that the juror had thereby developed a bias against appellant Mulligan in this case," and that the Stephenson arrest information was highly relevant to the issue of bias. *Id.* Mulligan's position in this regard is unsupported both in the record and as a matter of logic.

First, the defense never asked to have the panel of prospective jurors questioned about prior arrests, if any, or whether any of them harbored hostility toward members of the New York City Police Department.* Clearly, it was counsel's responsibility thoroughly to probe the possibility of a juror having been arrested by members of the New York City Police Department or other authority if such subject matter was deemed material by the defense to selection of a fair and impartial jury to

* The Government sought to have the Court inquire whether "any juror . . . [had] ever been charged with a crime." *See* Government's Proposed Examination of Prospective Jurors, item 7. The defense submitted no *voir dire* requests.

hear and determine the case against Mulligan. See *Andrade v. United Fruit Co.*, 312 F.2d 889 (2d Cir. 1963); *DeRosier v. United States*, 407 F.2d 959, 963 (8th Cir. 1969).

In the face of Mulligan's deliberate failure to have requested such an inquiry at trial,* the present claimed defense interest in challenging jurors who may have undergone such an experience truly sounds hollow.**

* It is particularly noteworthy that defense counsel simply expressed no interest during *voir dire* in the area of possible bias resulting from unjust arrest that now is alleged to have been of special significance to the defense jury selection strategy. Indeed, defendant specifically eschewed the trial judge's repeated invitations to counsel to propound additional questions during the *voir dire*. See, e.g., *voir dire* Tr. 16, 21, 32, 39, 55, 58, 61, 66, 73, 75, 81, 90, 122. "Counsel has every right to propound questions to the jury on *voir dire* which the Court has overlooked, in order to aid him in exercising his peremptory challenge." *DeRosier v. United States*, *supra*, 407 F.2d at 963. When this right is not invoked—at least with respect to a discrete subject matter such as prior arrest—it must be assumed that jury selection strategy is the explanation, not oversight or incompetence.

** Examination of the transcript of the *voir dire* discloses that the defense was preoccupied with a juror's experiences with the criminal justice system as victim, not as one accused of committing a crime. See, e.g., *Voir Dire* Tr. 85, 98, 111. Furthermore, where jurors disclosed that some relative had been accused of a crime, defense counsel evinced an interest only in the outcome of the case, particularly whether or not a trial had been held. See, e.g., *id.* 20, 78. Likewise, despite the Government's suggestion that one juror twice previously arrested be excused for cause upon consent, the defense refused. See A. 84-88.

Mulligan disingenuously refers (Br. 20-21) to three examples of defense counsel's expressed concern during *voir dire* to ferret out persons with prior exposure to "police or criminal proceedings" that might have resulted in "bias against law enforcement officials which would manifest itself in bias against appellant Mulligan in this case." In presenting the first example, that of the juror with three relatives who were in law enforcement, Mulligan glosses over

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Second, quite apart from Mulligan's evident lack of interest in such matters during the *voir dire*, defendant's present attempt to find bias against him on the part of Stephenson defies sound logic. Mulligan asserts now that Stephenson, in effect, perjured herself so that she could "remain on the jury to avenge her earlier treatment at the hands of other members of the New York City police force" (A. 229), and "harbored hostility over her arrest . . . [as] proven by the fact that she subsequently filed a counterclaim for false arrest in the civil suit initiated against her by the injured mail carrier."* (Br. 22). Aside

this prospective juror's prior service on a special grand jury (*Voir Dire* Tr. 41-43), a not insignificant consideration when a violation of 18 U.S.C. § 1623 is to be heard. Cf. *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir.), cert. denied, 412 U.S. 939 (1973). Similarly, in reciting the incident of the juror who had been the victim of a mugging, he fails to state that his counsel initially replied "No, your Honor" when asked by the court if there were any further questions for this prospective juror. (*Voir Dire* Tr. 58). Only after the Government sought further inquiry with respect to the mugging did Mulligan's counsel evince any interest in the venireman's impressions from his dealings with the police after the mugging. *Id.* The third tendered example relates to the juror with two prior arrests whom the defense refused to stipulate to excuse for cause, prompting the Government to strike him peremptorily. See A. 84-88, 90.

* Apparently, this asserted "harbored hostility," if it existed, was restricted to the Postal Service employee in question, Mr. Scelza, and perhaps his employer. Juror Stephenson never lodged a complaint, administrative or judicial, against the police officer who arrested her in 1973 claiming that he had done so falsely. (A. 250). Moreover, she explicitly stated at the post-trial hearing that her arrest had "been so many years ago and I have no grudge against the Police Department." (A. 147). The District Court accepted this statement as truthful and expressly found that "there was no animus borne by her consciously or otherwise against any party to this case which she was concealing to get on the jury to thereafter exhibit by a verdict." (A. 155). On appeal, such findings of the trial court regarding juror impartiality are not to be disregarded unless clearly erroneous. *Irvin v. Dowd*, 366 U.S. 717, 723-24 (1961); *Holt v. United States*, 218 U.S. 245, 248 (1910); *Reynolds v. United States*, 98 U.S. 145, 156 (1878); *Mikus v. United States*, *supra*, 433 F.2d at 723.

from the pure sophistry of these arguments that the unanimous verdict of Mulligan's guilt of one count of false swearing necessarily demonstrates emasculation of his right to a fair trial from Ms. Stephenson's presence on the jury, this reasoning all too conveniently ignores the fact that Ms. Stephenson's arrest and her related experience with the New York City Police Department were direct consequences of the bad neighborliness of the United States Postal Service facility adjoining her residence* and the complaint to the police made by a Postal Service watchman, Mr. Joseph Scelza. (A. 243, 282-84). Had Scelza not pressed the matter with the police, there would have been no arrest, no booking, no overnight jail stay, no need to hire a lawyer, no court appearances or testimony, etc. Surely, considering these circumstances, any unconscious leaning this juror might conceivably have possessed at the start of the trial would have been adverse to the United States, rather than the defendant.**

* During her post-trial examination by Judge Owen, the juror stated "[t]hat whole thing arose out of the people being victims of the post office running their trucks." (A. 149).

** As the District Judge observed (A. 113), there is an empty ring to the defense suggestion that had a challenge for cause to Ms. Stephenson based on the Scelza-arrest incident been denied—a prospect highly likely of occurrence, they would have peremptorily excused her. Persons accused of a crime—no doubt from their perspective unjustly—against whom all charges are dismissed soon after arrest and arraignment, are universally considered to be ideal defense jurors inasmuch as they have a unique personal understanding of the importance of the presumption of innocence. Cf. *Bush v. United States*, 16 F.2d 709, 711 (5th Cir. 1927) (denial of new trial affirmed where doubtful that had counsel learned during *voir dire* juror was under indictment defense would have objected). If anything, it would seem that the Government, not the defense, would have sought discharge of Ms. Stephenson from the panel, a likelihood that Mulligan hardly can now claim was prejudice suffered by him.

Faced with a similar failure to "raise a contention of bias from the realm of speculation to the realm of fact," *Mikus v. United States*, *supra*, 433 F.2d at 724, this Court held in *United States v. Eury*, 268 F.2d 517 (2d Cir. 1959), that a defendant was not entitled to a new trial as a result of claimed juror misconduct indistinguishable from that charged here.* The defendant in *Eury* was a building contractor accused of making a false statement to the Federal Housing Administration. After conviction he moved for a new trial on the ground that, on *voir dire*, one juror had affirmed "she had never been involved in any business dealings with any builder, and that there was nothing in her experience which would cause her to be prejudiced against a builder or contractor," whereas in fact she had lost a considerable sum in business dealings with a contractor who was also her brother-in-law. 268 F.2d at 521-22. Writing for a unanimous panel, Judge Waterman readily rejected the defense claim that the verdict should have been set aside, and held that the juror's past unfortunate experience with another practitioner of the defendant's occupation was not "so obvious a disqualification or so inherently prejudicial as a matter of law . . . as to require the granting of a new trial."** *Id.* at 522. In language equally appropriate to this case, Judge Waterman went on to explain the *ratio decidendi* of the decision:

* Despite the fact that the *Eury* decision was expressly regarded to have been controlling authority by the District Court in its decision on the new trial motion (A. 155), Mulligan's brief does not cite or otherwise acknowledge this precedent, let alone attempt to distinguish it.

** As authority for this proposition, *Cavness v. United States*, 187 F.2d 719 (9th Cir.), *cert. denied*, 341 U.S. 951 (1951), was cited. In *Cavness* the denial of a new trial was affirmed over objection that a venireman had concealed the fact that he was a reserve officer in the Honolulu Police Department, notwithstanding a general question on *voir dire* addressed to this very subject.

"We cannot assume that whatever continuing bitterness the juror might have because of her loss would be directed against anyone other than the person with whom she had been involved; or that if directed against others, those others would be 'contractors' as a class rather than 'brothers-in-law' or members of her husband's family." *Id.*

This Court's decision in *Eury*, we respectfully submit, is controlling here inasmuch as "whatever continuing bitterness" juror Stephenson retained as a result of her arrest cannot be assumed to have been directed against defendant Dennis W. Mulligan, rather than postal employee Joseph Scelza, Police Officer Moeser who acted on Scelza's complaint by arresting Ms. Stephenson, or postal or other federal employees in general.*

* The *Jury* decision is but one example of many which instruct that a jury verdict in a criminal case, reached after a fair trial and proper deliberations, will not be disturbed when after-the-fact claims of *voir dire* misconduct by jurors are interposed unsupported by cogent demonstration of actual prejudice. See, e.g., *Woods v. United States*, 364 F.2d 481, 483 (3d Cir.), *cert. denied*, 385 U.S. 972 (1966) (juror's failure to disclose dealings with the F.H.A. in response to question asked of panel in prosecution for filing false statement with F.H.A.); *United States v. Provenzano*, *supra*, 240 F. Supp. at 410 (union member juror's concealment of alleged bias against defendant, a prominent labor union official); *United States v. Wayman*, *supra*, 510 F.2d at 1023-24 (silence in response to question asked of panel concerning juror's business or social dealings with defendants); *United States v. Robbins*, 500 F.2d 650, 652-54 (5th Cir. 1974) (juror failed to reveal that her daughter had been hospitalized because of the use of prescription diet pills in response to inquiry concerning bad experiences with doctors or substances mentioned in indictment charging physician with dispensing controlled substances improperly); *United States v. Shahane*, 517 F.2d 1173, 1178-79 (8th Cir.), *cert. denied*, 423 U.S. 893 (1975) (non-

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revelation by juror in narcotics prosecution that she shared prevailing community views regarding hair length and drug use); *DeRosier v. United States*, *supra*, 407 F.2d at 962-64 (non-disclosure of juror's acquaintance with one of the defendants who later became a prosecution witness at the trial); *Connelly v. United States*, 249 F.2d 576, 584 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958) (in trial of prominent Democratic politicians, concealment by jurors of their Republican affiliations and activities on behalf of GOP by family members); *United States v. Kraude*, 467 F.2d 37, 40-41 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972) (concealment of juror's prior employment by the United States Government, including local office of the Department of Justice); *Jackson v. United States*, 408 F.2d 306, 308-09 (9th Cir. 1969) (failure to disclose juror's recognition of having had previous contact with one of the defendants); *Marshall v. United States*, *supra*, 355 F.2d at 1008-10 (failure by juror, to acknowledge in response to inquiry whether he was or had even been employed as law enforcement officer that he carried special police officer's badge); *Cavness v. United States*, *supra*, 187 F.2d at 722-23 (juror's status as reserve police officer not mentioned on *voir dire*); *Williams v. United States*, 418 F.2d 372, 376-77 (10th Cir. 1969) (failure to disclose in bank robbery trial that juror's employer, supermarket chain, had recently been victim of robbery); *Weich v. United States*, 371 F.2d 287, 294 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966) (in trial of Justice of Oklahoma Supreme Court, juror's failure to reveal in response to question whether any near relatives had been involved in litigation reviewed by Supreme Court of Oklahoma that her father had been disbarred by order of that court); *Brown v. United States*, 356 F.2d 230, 232-33 (10th Cir. 1966) (juror's non-disclosure in murder prosecution of her brother having been a homicide victim in response to query whether jurors or immediate family members had ever been victim of attack upon their person); *Deschenes v. United States*, 224 F.2d 688, 690-91 (10th Cir. 1955) (asked about peace officer status, jury foreman did not mention his membership on Wichita, Kansas Crime Commission); *Turner v. United States*, *supra*, 416 F.2d at 817 (asked if any member of jury panel had ever been robbed, juror did not mention that his family residence had been burglarized); *United States v. Baker*, *supra*, 266 F. Supp. at 462-63 (non-disclosure of juror's position as Lieutenant in D.C. Police Reserve).

Apparently aware of this substantial failure to buttress his complaint with real, rather than imagined, demonstration of bias by juror Stephenson resulting in prejudice to the defense, Mulligan instead contends (Br. 19-22) that a new trial is required because Ms. Stephenson's conduct deprived the defense of its right intelligently to exercise peremptory challenges under Fed.R. Crim.P. 24(b). However, the law is squarely to the contrary.

In nearly all of the decisions which have considered alleged juror misconduct on the *voir dire*, the "impaired peremptory challenge" argument offered by Mulligan here expressly was advanced in support of the unsuccessful new trial requests. *E.g.*, *United States v. Shahane*, *supra*, 517 F.2d at 1179; *United States v. Robbins*, *supra*, 500 F.2d at 653 n.6; *Williams v. United States*, *supra*, 418 F.2d at 377; *Marshall v. United States*, *supra*, 355 F.2d at 1008; *DeRosier v. United States*, *supra*, 407 F.2d at 962-63; *United States v. Provenzano*, *supra*, 240 F. Supp. at 410. The *sine qua non* for relief from verdict is a proper demonstration, not mere supposition, that the defendant was prejudiced because a particular individual was a member of the jury. *See United States v. Robbins*, *supra*, 500 F.2d at 653 n.6. Hypothesized bias and retrospective assertion that a peremptory challenge would have been exercised, standing alone, simply are insufficient to overturn the finality with which the jury speaks when returning a guilty verdict. As the Tenth Circuit observed in *Williams v. United States*, *supra*, 418 F.2d at 377:

"In the absence of a showing of actual bias or an intentional withholding of the facts, there is little in the record from which the court can conclusively presume that the non-disclosure was obvious disqualification and inherent prejudice as a matter of law. Whether juror Dillon had any precon-

ceived enmity, prejudice, or bias against defendant is a matter of supposition. The fact that juror Dillon might have been peremptorily challenged by defendant is not alone sufficient to reverse defendant's conviction. Defendant is entitled to a fair trial, but not a perfect trial."

While ignoring totally *Eury* and the large number of other decisions squarely against him, Mulligan in his brief (p. 32) incorrectly invokes two cases—*Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968) and *United States ex rel. DeVita v. McCorkle*, 248 F.2d 1 (3d Cir.), cert. denied, 355 U.S. 873 (1957)—as supposed precedent for the relief requested on this appeal. Although these two cases nominally awarded new trials where jurors had omitted information probative of possible bias on *voir dire*, the decisions and their factual underpinnings plainly are distinguishable from the circumstances and issues presented by the case at bar. Furthermore, this Court not only has explicitly recognized the *sui generis* nature of *Jackson* and *DeVita*—emphasizing that the two decisions must be interpreted as limited to their peculiar factual complexions—but even with that caveat has expressed serious reservations about endorsing the reasoning and results therein. See *Mikus v. United States*, *supra*, 433 F.2d at 723.*

In *Jackson*, a murder prosecution, one of the jurors was discovered after the trial to have had a recent life experience—involvement in a love triangle—which precisely paralleled the circumstances of the homicide proved at trial. Even though there was no specific inquiry of

* This Court is not alone in its criticism of the jurisprudential approach taken in *DeVita* and *Jackson*. Professor Moore characterizes the result in *Jackson* as "ridiculous" but for the fact that it was a murder case. 8A J. MOORE, *Federal Practice* ¶ 24.03 at p. 24-30 n.10.

the juror concerning this rather unique experience, the Court of Appeals for the D.C. Circuit nonetheless concluded, relying on *DeVita*, that because the defendant was charged with a capital offense the juror's presence on the jury violated Jackson's Sixth Amendment right to a trial by impartial jury.

DeVita involved a similar striking parallel between the facts of the crime on trial—a felony murder committed in the course of an armed robbery—and the experience of one juror, who, within seven months' time of the murder, himself had been robbed on the *same* street on which the crime on trial had occurred, on his way, *like the murder victim*, to make a night deposit at a branch of the National State Bank. In response to a specific inquiry this juror concealed both the fact of his having been robbed, as well as his acquaintance with members of the police squad which had investigated the robbery-murder.* Moreover, the prosecution was conducted in a fashion which brought the juror's own similar experience vividly to the forefront of his mind throughout the trial and, later, during the jury's deliberations. In a four-to-three en banc decision, the Third Circuit directed a new trial, holding that the closeness of the juror's connection with the trial content was "frightening" and that since "possible deprivation of human life" was at stake,** extraordinary scrutiny of the proceedings for fairness was warranted. 248 F.2d at 9.

* In fact, the juror maintained his silence throughout the examination and excuse of other talesmen who revealed associations with the crime of lesser parallel than his own.

** As a practical matter, the only question to be resolved by the trial jury in *DeVita* was the question whether the defendants were to receive a life sentence or to be executed. See 248 F.2d at 8-9.

Jackson and *DeVita* bear no resemblance to the present case. Ms. Stephenson had no connection with the trial content in this case, least of all a frightening one. See *Mikus v. United States*, *supra*, 433 F.2d at 723. Nor, as demonstrated earlier, does this Court or the other courts which have had occasion to consider the issue, construe as a "weighty prejudicial occurrence", *DeVita*, *supra*, 248 F.2d at 9, non-disclosure of an experience so far removed from the issues which were tried as a prior arrest which never proceeded past arraignment.*

Mulligan's sole remaining contention is that the trial court denied him an adequate opportunity at the post-trial hearing to inquire into juror Stephenson's state of mind during the *voir dire*, trial and jury deliberations, as well as in respect of possible disqualification to have served on the jury by reason of hypothesized incapacitating mental and emotional problems. (Br. 31-33). With regard to the latter aspect of the claimed error in the District Court's handling of the matter, the complete answer is that this Court's decision in *United States v. Dioguardi*, *supra*, 492 F.2d at 78-81, fully supported

* *Clark v. United States*, 289 U.S. 1 (1933) and *United States v. Lampkin*, 66 F. Supp. 821 (S.D. Fla. 1946), cited by Mulligan (Br. 32) as authorizing the grant of a new trial, are equally inapposite. Both of these cases were criminal contempt prosecutions of jurors arising out of their conduct on the *voir dire*. Manifestly, for the same reasons explicated earlier that juror Stephenson did not perjure herself on the *voir dire* (see pp. 17-20, *supra*), she cannot be found to have committed an act of criminal contempt by failing to have volunteered the circumstances of the Scelza-arrest incident in reply to the court's "involvement" inquiry. And, in any event, the strong policy forbidding post-verdict investigation into the jury's deliberations attendant upon "the right of the jury in its impartiality to be independent," *United States v. Robbins*, *supra*, 500 F.2d at 654, is not to be overridden to award a convicted defendant a new trial merely because of a completely unsupported claim that a juror misconducted herself in a contumacious fashion.

the course followed by Judge Owen. Likewise, the trial judge's refusal to allow defense counsel to examine Ms. Stephenson under oath, or himself to inquire of her, with respect to subject matters requested by defense counsel—other than the core issues of (i) her explanation for not having disclosed her prior arrest and (ii) whether or not she was influenced to wish to serve on the jury by her 1973 experience—was in accordance with the established procedures prescribed by this Court for such post-verdict questioning of jurors. See *Grace Lines, Inc. v. Motley*, *supra*, 439 F.2d at 1032, 1034 n.2; *United States v. Grieco*, *supra*, 261 F.2d at 415; *United States v. Flynn*, 216 F.2d 354, 368 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955); *United States v. Nash*, 414 F.2d 234, 236 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969). Cf. *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

When all is said and done, Mulligan's repeated efforts to tarnish the diligence and attention with which the jurors discharged their responsibilities in this case fall far short of the level required to overcome "the strong public interest in the integrity of jury verdicts and the protection of jurors from harassment." *United States v. Green*, *supra*, 523 F.2d at 235. Suspicion, speculation, guesswork, surmise, hindsight and even a background investigation into the personal life of at least one member of the jury * all have failed to do more than spin one chimerical doubts regarding his conviction of making a false material declaration before a United States grand jury "so amply justified by the evidence in the record."

* Such investigations are strongly disfavored by the courts. See, e.g., *United States v. Brasco*, *supra*, 516 F.2d at 819 n.4; *Miller v. United States*, *supra*, 403 F.2d at 81-84; *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967); *Sinclair v. United States*, 279 U.S. 749 (1929).

See *United States v. Allied Stevedoring Corp.* 258 F.2d 104, 106 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958). Though Mulligan opines he was denied a fair trial, there is nothing to support his obviously skewed vision.*

"That a juror might not have been impartial, is indeed, a possibility. But, when we venture into speculation over thoughts or attitudes not manifest, there is always the chance that any jury empanelled to try a case may include an individual whose prejudices have not been revealed." *United States v. Colabella*, 448 F.2d 1299, 1302 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972).

Invocation of the defendant's speculated retrospective concept of fairness in a trial which has ended in his conviction "would result in unwarranted reversals of perfectly fair jury verdicts and would inject an unjustifiable degree of instability into the jury system." *Fritz v. Boland & Cornelius*, 287 F.2d 84, 86 (2d Cir. 1961). Were the rule otherwise and a conviction subject to upset for unsubstantiated, unspecific protestations of juror bias, the institution of jury trial would surely collapse. *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947). See also *United States v. Haynes*, 980, 985 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969); *Brown v. United States*, *supra*, 356 F.2d at 233.

* Without meaning to dignify in the slightest Mulligan's proffer (Br. 12, 27) of the alleged kiss blown toward the prosecution table as proof of juror partiality, this episode provides an excellent example of the chaos which would result if the position contended for by Mulligan were adopted by this Court. The blowing of the kiss was not contemporaneously, or nearly so, reported in the trial record, nor was it witnessed by anyone in the courtroom save counsel for the defense. See A. 115. The obviously evanescent and dubiously reliable nature of such "proof" prompted Judge Owen to remark: "Come on. . . . You can make the statement but I find that . . . to be utterly ridiculous." (A. 115).

The record in this case, as amplified by the District Court's through post-verdict hearing, makes abundantly clear that Mulligan received a fair and impartial trial, and his vigorous, but unfounded, efforts to cast aspersions on the integrity of the jury which convicted him must be rejected.

POINT II

The District Court Correctly Excluded Those Portions Of Mulligan's Grand Jury Testimony That Were Hearsay.

Only a single claim of error is advanced concerning the numerous evidentiary rulings which the District Judge was called upon to make during this two-week long trial. According to Mulligan, once the portions of his grand jury testimony which the Government contended—and the grand jury charged—were false had been received into evidence upon the Government's offer, he then was entitled to introduce the remainder of his testimony "so that the veracity of the challenged portions could be judged in the context in which they were given." (Br. 35). This assertion is totally incorrect.

In this Circuit the black letter rule "is that the prosecution is not required to offer the defendant's entire grand jury testimony so long as 'the statements admitted are given sufficiently in their context so as not to confuse the trier.'" *United States v. Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969), *quoting United States v. Rosenblum*, 339 F.2d 473, 475 (2d Cir. 1964).^{*} *See also United States v. Kravitz*, 281 F.2d 581,

^{*} *Capaldo*, a bank robbery prosecution in which the Government sought to prove Capaldo's guilt by demonstrating an unexplained acquisition of wealth shortly after the robbery and by showing contradictions between Capaldo's statements before the grand jury concerning his whereabouts during and after the

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587 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961); *United States v. Johnson*, 165 F.2d 42, 48 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948). This was precisely the standard applied by Judge Owen in ruling upon Mulligan's request that his testimony before the grand jury be received *in toto*. (Tr. 994-95).

Apart from the introductory warnings as to constitutional rights and related matters,* the passages from Mulligan's grand jury testimony offered by the Government (Tr. 962-68) concerned his sworn denials of knowing or recognizing photographs of his co-defendant, John Cerasani, or of his accomplices in the bank robbery, Frank Smith and Martin Shannon. None of the remaining portions of his testimony related to this same subject matter; neither were they necessary to make those portions already introduced by the prosecution properly understood

robbery and trial testimony by other witnesses of his boasts to them of having "pulled the Oakville bank job", is clearly dispositive here. In affirming the ruling of the trial judge (Timbers, J.) excluding self-serving portions of Capaldo's grand jury testimony, this Court held:

"The portions of Capaldo's grand jury testimony read by the prosecution dealt with Capaldo's claims of alibi and his denials of having made admissions to the Longos and Miss Hansen. Included in this testimony were references to Capaldo's purchase of horses, saddles and a diamond ring for his girl friend. The portions which appellant sought unsuccessfully to have read related to his claim that he had borrowed money from his co-defendant Ursini. While the statements which defense counsel sought to have admitted were not totally unrelated to those admitted, they were not essential to a fair and impartial understanding of the statements read. We think that the trial court was well within its discretion in excluding those parts of the grand jury testimony offered by the defendant." 402 F.2d at 824.

* There was no objection by the defense to these statements. In any event, such portions were relevant and properly received on the issues of Mulligan's knowledge of the nature of the investigation being conducted by the grand jury and his state of mind while testifying in the fashion in which he did. *Cf.* 18 U.S.C. § 3501(b).

nor to explain, clarify or qualify the denials. See *United States v. Grunewald*, 164 F. Supp. 644, 648 (S.D.N.Y. 1958). Although the District Court repeatedly offered to entertain a proffer of discrete additional parts of the testimony having a direct relationship to the portions previously read, none was forthcoming. (Tr. 963, 966, 994-95, 999-1005). Instead, Mulligan's counsel steadfastly sought to introduce all of the remaining testimony. Indeed, even after the District Judge ruled that a limited additional portion of the testimony could be introduced to demonstrate that Mulligan had acknowledged knowing and recognizing a photograph of Joe Gernie during his grand jury appearance, counsel withdrew the offer unless still further portions, clearly self-serving in nature,* were also to be read to the jury.** (Tr. 1003).

In urging that the District Court abused its discretion by denying his application to have the remainder of the grand jury testimony placed before the jury, Mulligan invokes the doctrine of completeness. (Br. 37). However, this doctrine—of which the rule with respect to permissible selective use of a defendant's grand jury testimony at trial reflected by the *Capaldo* and *Rosenblum* decisions of this Court may be seen as a special application—merely permits "the further use of the document to explain the portion in evidence as fully as the document may allow [but] does not extend to portions which are irrelevant to the initial use." *Camps v. New York City Transit Authority*, 261 F.2d 320, 322 (2d Cir. 1958). And, even where the testimony necessary to complete the story

* Judge Owen described these further portions as "in effect [Mulligan's] testimony of innocence." (Tr. 1003).

** As a practical matter what counsel sought was application of the long-discredited notion "that either the whole document, or no part of it, was competent." *United States v. Dennis*, 183 F.2d 201, 229 (2d Cir. 1950), *aff'd*, 341 U. S. 494 (1951). Of course, "[t]here is no such rule; . . . it is well-settled that only those parts which throw light upon the parts already admitted become competent upon its introduction." *Id.* at 229-30.

is hearsay or other excludable matter, the trial court still retains discretion in deciding whether or not to permit completion. *United States v. Apuzzo*, 245 F.2d 416, 422 (2d Cir.) (en banc), *cert. denied*, 355 U.S. 831 (1957); C. McCORMICK, *Law of Evidence* § 56 at p. 132 (1954). Thus, wholly apart from declining the wholesale tender of the remainder of Mulligan's grand jury testimony as having "no bearing to explain or qualify," *Gencarella v. Fyfe*, 171 F.2d 419, 422 (1st Cir. 1948), or "throw light upon the parts already admitted," *United States v. Littwin*, 338 F.2d 141, 146 (6th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965), Judge Owen acted well within his discretion in excluding the remaining portions as "the self-serving testimony of the defendant." (Tr. 1003). See *United States v. McCorkle*, 511 F.2d 482, 486-87 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 826 (1975).

Mulligan's exculpatory declarations before the grand jury when offered *by* not *against* him were indisputably hearsay under Rule 801 of the Federal Rules of Evidence and, as such, inadmissible under Rule 802. Clearly, an exculpatory statement given by a grand jury witness who has been notified that he is a target of the grand jury's investigation has none of the indicia of reliability commonly associated with the various exceptions to the hearsay rule.* Indeed, such statements are obviously self-serving. To allow the admission of these statements as

* In discussing the rationale for receiving *admissions* in evidence, Judge Weinstein notes that such statements are not admissible because made under circumstances which foster reliability, but instead are received "because a party cannot object to his failure to cross-examine himself. . . ." 4 J. WEINSTEIN & M. BERGER, *Evidence* ¶ 801(d)(2)[01] at pp. 111-12 (1976). See also 4 J. WIGMORE, *Evidence* § 1048 at pp. 4-5 (Chadbourn rev. 1972).

substantive evidence * would result in criminal defendants being permitted, in effect, to testify without fear of cross-examination in the presence of the trial jury. Neither the current rules nor prior decisional law permit any such thing.**

Contrary to Mulligan's suggestion (Br. 39), the effect of the trial court's ruling was not to prevent him from having allegedly false answers judged in the context in which they were given or to deny him the opportunity to offer an explanation to the thrust of the Government's case, but merely the chance of doing so by means of a series of self-serving hearsay statements. *United States v. Garcia*, 418 F.2d 568, 570 (9th Cir. 1969). The District Court was thus clearly justified in refusing to permit the indiscriminate receipt of the unread testimony.

* At no point during the trial did Mulligan's counsel suggest that he was offering the entirety of his client's grand jury testimony other than "to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Indeed, even now Mulligan claims that the remainder of the testimony should have been admitted because "[t]he obvious truthfulness of those sections, as established by the Government's own evidence at trial, tended to bolster the credibility of the challenged portions." (Br. 36).

** The hodge-podge of cases and other authorities cited in Mulligan's brief, many of which are not even from the federal courts, certainly do not support the admission upon Mulligan's request of all remaining portions of his grand jury testimony not offered by the Government as admissions. Without attempting to distinguish each of the cases inappositely cited, suffice it to say that upon analysis they stand for no more than the unexceptionable propositions either (i) that when a non-party witness testifies and is impeached on cross-examination by use of a writing which the witness prepared, on redirect the proponent may rehabilitate the witness by introducing other portions of the writing or (ii) that in a criminal case the prosecution may if it wishes offer into evidence the entirety of statements by the accused, both those which are inculpatory as well as those viewed by the prosecution as falsely exculpatory.

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POINT III

The Court's Charge Did Not Improperly Withdraw Elements Of The Offense From The Jury's Consideration.

Conceding that the District Court properly explained to the jurors the four essential elements of the crime of making a false material declaration before the grand jury (Br. 40), Mulligan leaps to the unwarranted conclusion that the jury was thereafter instructed by the trial judge to disregard two of these elements—the requirements that the perjurious declaration be made under oath and that it be material to the grand jury's investigation—"based on his conclusion that they had been conclusively established." (Br. 41). In fact, the trial judge did no such thing and Mulligan's arguments in this regard are completely frivolous.

It is by now familiar learning that materiality under the perjury statutes * is a question of law for the court, not a fact to be proved to the jury. *E.g.*, *Sinclair v. United States*, 279 U.S. 263, 298 (1929); *Carroll v. United States*, 16 F.2d 951, 954 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927); *United States v. Weber*, 197 F.2d 237, 238 (2d Cir.), *cert. denied*, 344 U.S. 834 (1952); *United States v. Alu*, 246 F.2d 29, 32 (2d Cir. 1957); *United States v. Siegel*, 263 F.2d 530, 533 (2d Cir.), *cert.*

Neither does Rule 106 of the Federal Rules of Evidence—not considered by Mulligan in his brief—support his position. As Judge Weinstein notes:

" . . . the rule covers an order of proof problem; it is not designed to make something admissible that should be excluded." 1 J. WEINSTEIN & M. BERGER, *Evidence* ¶ 106[01] at p. 12 (1976).

See also *id.* ¶ 106[02] at p. 13.

* Cases construing 18 U. S. C. § 1621 are applicable to 18 U. S. C. § 1623. *United States v. Mancuso*, 485 F.2d 275, 280 n.15 (2d Cir. 1973).

denied, 359 U.S. 1012 (1959); *United States v. Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965); *United States v. McFarland*, 371 F.2d 701, 703 n.3 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); *United States v. Jones*, 374 F.2d 414, 419 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), *vacated per curiam on other grounds*, 392 U.S. 299 (1968); *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970); *United States v. Mancuso*, *supra*, 485 F.2d at 277; *United States v. Doulin*, 538 F.2d 466, 470 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976). Thus it was entirely proper for Judge Owen to decide the question of materiality as a matter of law and to instruct the jury accordingly. *United States v. Doulin*, *supra*, 538 F.2d at 470; *United States v. McFarland*, *supra*, 371 F.2d at 703 n.3.

So, too, Mulligan is way off base in asserting that the trial court in effect directed a verdict on the issue of whether or not he took an oath to testify truthfully before a United States grand jury in the Southern District.

Mulligan apparently now objects for the first time** to the following remarks by Judge Owen:

* Mulligan's position with respect to materiality is scarcely a model of clarity. While he appears to be contending that "the evidence was not conclusive . . . on the element of materiality," he at no time during trial sought to convince either the judge or jury of the non-materiality of the allegedly perjurious testimony, nor does he contend here that as a matter of law his statements were not material to the grand jury's investigation. Of course any such argument would be unavailing. *See United States v. Alu*, *supra*, 246 F.2d at 31-33.

** No objection was raised by Mulligan's counsel on this ground during either the first or second trials. Nor was there objection to Request to Charge No. 25 proposed by the Government, which Judge Owen's charge on this point tracked almost *in haec verba*. *See* Tr. 1350-70. And, of course, the defense did not submit any of their own requests to charge. *Cf. United States v. Devitt*, 499 F.2d 135, 137 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

"In this case, as the evidence shows, and there is no serious dispute, Mr. Mulligan did appear before a grand jury for the Southern District of New York and took an oath that he would testify truthfully and that such grand jury was authorized by law to administer oaths." (A. 43-44).

Far from removing the element of "appearance under oath" from the province of the jurors by informing them that this element had been proven beyond a reasonable doubt,* the sole effect of this statement was accurately to inform the jurors that the defense was apparently disputing not that Mulligan had given sworn testimony before the grand jury, but only that this testimony had been wilfully false when given.** See *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Thus the District Court's comment was not at all improper.

Moreover, a District Judge "is permitted to comment upon the evidence if he does so fairly and makes clear to the jury that all matters of fact are submitted for their determination." *Id.* See also *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). During the charge here Judge Owen followed the standard practice of instructing the jurors that they were the sole and exclusive judges of facts, that

* Contrast the trial judge's handling of the materiality point: "I charge you as a matter of law that the matters as to which Mr. Mulligan was asked as set forth in the indictment were material to the issues under inquiry before the grand jury before which the testimony was given." (A. 44) (emphasis supplied).

** Indeed, it was an aspect of Mulligan's defense strategy to emphasize to the jury during summation as a point in his favor that he had voluntarily appeared before the grand jury investigating the December 10, 1971 bank robbery and given sworn testimony. See Tr. 1497-99.

they alone were to decide the weight, effect and value of the evidence and were not bound by his opinions or suggestions as to the contentions of the parties, the assessment of which was solely the jury's responsibility. (A. 14-16, 50-51, 55-56). Furthermore, the jury was specifically admonished that "just because evidence is uncontradicted in the record you need not accept it if you do not find it to be believable." (A. 56).^{*} Viewed in this light, the judge's expressed opinion as to the absence of dispute with regard to a technical element of the offense was not in any sense unfair. *United States v. Natale, supra*, 526 F.2d at 1167. This is particularly so considering that it was not challenged by the defense that Mulligan had appeared before the grand jury and given testimony under oath^{**} and since "the jury's role as finder of facts was repeatedly and accurately explained by the trial court." *Id.* at 1168.

In any event, during summation Mulligan's counsel sought to persuade the jury of his client's innocence by highlighting for them the fact that Mulligan had waived his Fifth Amendment privilege and appeared before the grand jury voluntarily to give his sworn testimony. Counsel thus argued:

"Dennis Mulligan testified in the grand jury.
Do you know you have a right to refuse to testify

^{*} It bears emphasis that Judge Owen did not charge that there was uncontradicted evidence on the appearance under oath element of the "offense which 'as a matter of law' foreclosed jury deliberations" on this issue. *United States v. Natale, supra*, 526 F.2d at 1167 n.7. Rather, he noted that there was "no serious dispute" on this point. This was not tantamount to a direction that the evidence about which there was "no serious dispute" proved the element of the offense beyond a reasonable doubt. *Id.*

^{**} There is not even a hint of a suggestion in Mulligan's brief that the trial evidence establishing that he had testified under oath before the grand jury and made false material declarations was insufficient to sustain his conviction.

in the grand jury? You have an absolute right to say no, I am not going to testify unless you grant me immunity. He had nothing to hide. He raised his right hand and told the truth and testified.

If he had any consciousness of guilt, wouldn't he say, 'I am not going to testify in the grand jury.'

He went into the grand jury and said 'Sure, I will testify in the grand jury. I will tell you the truth. What do you want to know. . . .' (Tr. 1497-99).

Having adopted this tactical posture, it is hardly remarkable that as a further matter of strategy no objection was raised to Judge Owen noting that there was "no serious dispute" concerning the first element of the offense. See *United States v. Pravato*, 505 F.2d 703, 705 (2d Cir. 1974); *United States v. Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). It certainly ill behooves counsel to have stood mute when had he noted appropriate objection to the charge the trial judge could easily have cured the matter, and now, after his gamble on an acquittal of his client has been lost, to proclaim plain error. (Br. 42-43). See *United States v. Gersh*, 328 F.2d 460, 464 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964); *United States v. Agueci*, 310 F.2d 817, 838 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Such attempted trifling with the orderly administration of criminal justice ought not be countenanced.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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ADDENDUM

New York Civil Rights Law

§ 79-e Return of fingerprints, palmprints and photographs.

Upon the determination of a criminal action or proceeding against a person, in favor of such person unless another criminal action or proceeding is pending against him or unless such person has previously been convicted in this state of a crime or of the violation of loitering, as defined in subdivision three of section 240.35 of the penal law or has previously been convicted elsewhere of any offense which would be deemed a crime or the violation of loitering, as defined in subdivision three of section 240.35 of the penal law if committed within the state, every photograph of such person and photographic plate or proof, palmprints and fingerprints taken or made of such person while such action or proceeding is pending by direction or authority of any police officer, peace officer, or any member of any police department and all duplicates and copies thereof shall be returned on demand to such person or his representative, duly authorized in writing, who is an attorney admitted to practice law in New York State, by the police officer, peace officer or member of any police department having any such photograph, photographic plate or proof copy or duplicate in his possession or under his control; and such police officer, peace officer or member of any police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor.

New York Criminal Procedure Law

§ 160.50 Order upon termination of criminal action in favor of the accused.

1. Upon the termination of a criminal action or proceeding against a person in favor of such person, as de-

fined in subdivision two of this section, unless another criminal action or proceeding is pending against such person, or unless the district attorney upon motion with not less than five days notice to such person or his attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, the court wherein such criminal action or proceeding was terminated shall enter an order, which shall immediately be served by the clerk of the court upon the commissioner of the division of criminal justice services and upon the heads of all police departments and other law enforcement agencies having copies thereof, directing that:

(a) every photograph of such person and photographic plate or proof, and all palmprints and fingerprints taken or made of such person pursuant to the provisions of this article in regard to the action or proceeding terminated, and all duplicates and copies thereof, shall forthwith be returned to such person, or to the attorney who represented him at the time of the termination of the action or proceeding, at the address given by such person or attorney during the action or proceeding, by the division of criminal justice services and by any police department or law enforcement agency having any such photograph, photographic plate or proof, palmprint or fingerprints in its possession or under its control;

(b) any police department or law enforcement agency including the division of criminal justice services, which transmitted or otherwise forwarded to any agency of the United States or of any other state or of any other jurisdiction outside the state of New York copies of any such photographs, photographic plates or proofs, palmprints and fingerprints shall forthwith formally request in writing that all such copies be returned to the police department or law enforcement agency which transmitted or forwarded them, and upon such return such department or agency shall return them as provided herein;

(c) all official records and papers other than court decisions relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office be sealed and not made available to any person or public or private agency; and

(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license.

2. For the purpose of subdivision one of this section, a criminal action or proceeding against a person shall be considered terminated in favor of such person where:

(a) an order dismissing the accusatory instrument pursuant to article four hundred seventy was entered; or

(b) an order to dismiss the accusatory instrument pursuant to section 170.30, 170.50, 170.55, 170.56, 210.20, or 210.46 of this chapter was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people; or

(c) a verdict of complete acquittal was made pursuant to section 330.10 of this chapter; or

(d) a trial order of dismissal pursuant to section 290.10 or 360.40 of this chapter was entered and the people have not appealed from such order or the deter-

mination of an appeal or appeals by the people from such order has been against the people; or

(e) an order setting aside a verdict pursuant to section 330.30 or 370.10 of this chapter was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people and no new trial has been ordered; or

(f) an order vacating a judgment pursuant to section 440.10 of this chapter was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people, and no new trial has been ordered; or

(g) an order of discharge pursuant to article seventy of the civil practice law and rules was entered and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people.

3. A person in whose favor a criminal action or proceeding was terminated, as defined in subdivision two of this section, prior to the effective date of this section, may upon motion apply to the court in which such termination occurred, upon not less than twenty days notice to the district attorney, for an order granting to such person the relief set forth in subdivision one of this section, and such order shall be granted unless another criminal action or proceeding is pending against him, or unless the district attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise.

§ 160.60 Effect of termination of criminal actions in favor of the accused.

Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section 160.50 of this chapter, the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.



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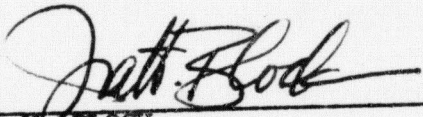
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

IRA H. BLOCK being duly sworn,
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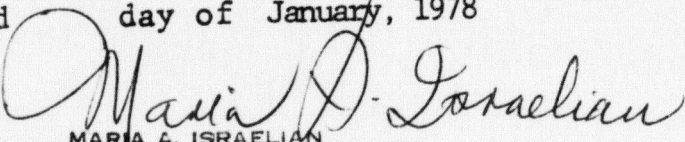
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IRA H. BLOCK
Assistant United States Attorney

Sworn to before me this

3rd day of January, 1978


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Term Expires March 30, 1978

